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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

KEITH T. TAYLOR, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

PETITION FOR A WRIT OF CERTIORARI

RICHARD KEITH STUTZEL
Major, U.S. Marine Corps
Counsel of Record

BRIAN CHRISTOPHER LANSING
Lieutenant, Judge Advocate
General's Corps
U.S. Naval Reserve

NAVY-MARINE CORPS APPELLATE
DEFENSE DIVISION
Washington Navy Yard
Washington, D.C. 20374-1111
(202) 433-4161
Counsel for Petitioner

December 1994

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QUESTION PRESENTED

Does a so-called "unit sweep inspection" of Petitioner's military organization violate Petitioner's Fourth Amendment right against unreasonable searches and seizures when the inspection is ordered following an anonymous report of Petitioner's drug use to command authorities and this information is wrongly withheld by those individuals from the commanding officer authorizing the inspection?

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

KEITH T. TAYLOR, Staff Sergeant
United States Marine Corps,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

The Petitioner, Keith T. Taylor, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals[1] rendered in this proceeding on September 30, 1994.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals, *United States v. Taylor*, 41 M.J. 168 (C.M.A. 1994), is reprinted as Appendix A.

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[1] The United States Court of Military Appeals has been renamed the United States Court of Appeals for the Armed Forces. All cases relevant to this petition were decided before the name change, so the original name of the court is used in this petition.

The opinion of the United States Navy-Marine Corps Court of Military Review[2], *United States v. Taylor*, No. 91-0669 (N.M.C.M.R. February 24, 1993), is reprinted as Appendix B.

JURISDICTION

The United States Court of Military Appeals affirmed the decision of the United States Navy-Marine Corps Court of Military Review on September 30, 1994. Title 28 U.S.C. § 1259(3) provides jurisdiction in this case and entitles Petitioner to seek review of the United States Court of Military Appeals' decision.

CONSTITUTIONAL PROVISION AND REGULATIONS INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Military Rule of Evidence 311(a) provides:

> Evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against the accused if: (1) Objection. The accused makes a timely motion to suppress or an objection to the

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[2] The United States Navy-Marine Corps Court of Military Review has been renamed the United States Navy-Marine Corps Court of Criminal Appeals. All cases relevant to this petition were decided before the name change, so the original name of the court is used in this petition.

> evidence under this rule; and (2) Adequate interest. The accused had a reasonable expectation of privacy in the person, place or property searched; the accused had a legitimate interest in the property or evidence seized when challenging a seizure; or the accused would otherwise have grounds to object to the search or seizure under the Constitution of the United States as applied to members of the armed forces.

Military Rule of Evidence 313(b) provides, in pertinent part:

> An "inspection" is an examination of the whole or part of a unit . . . to determine and to ensure the security, military fitness, or good order and discipline of the unit . . . . An order to produce body fluids, such as urine, is permissible in accordance with this rule. An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inspection within the meaning of this rule. If the purpose of an examination is to locate weapons or contraband, and if: (1) the examination was directed immediately following a report of a specific offense in the unit . . . and was not previously scheduled; (2) specific individuals are selected for examination; or (3) persons examined are subjected to substantially different intrusions during the same examination, the prosecution must prove by clear and convincing evidence that the examination was an inspection within the meaning of this rule.

STATEMENT OF THE CASE

Petitioner, an active duty Marine, was charged with wrongfully using marijuana within the period of December 1 to December 12, 1989, in violation of Article 112a, Uniform Code of Military Justice (U.C.M.J.), 10 U.S.C. § 912a. The evidence consisted of a positive result for marijuana in a urinalysis test administered to Petitioner pursuant to a purported inspection of his work section, the S-1 section of Headquarters Company, Fifth Marine Regiment, First Marine Division. At his Special Court-Martial, Petitioner moved to suppress the results of the urinalysis test on the grounds that the inspection conducted on his work section was a subterfuge to allow his urine to be seized without a probable cause search because anonymous allegations of drug use had been made against him. Petitioner's motion to suppress the results was denied by the military judge.

Notwithstanding his pleas to the contrary, Petitioner was found guilty of the wrongful use of marijuana. Petitioner was sentenced to hard labor without confinement for 45 days, reduction to the lowest enlisted pay grade, and to be discharged from the Marine Corps with a bad-conduct discharge. The sentence was approved by the convening authority.

The United States Navy-Marine Corps Court of Military Review affirmed the findings and sentence. *United States v. Taylor*, No. 91-0669 (N.M.C.M.R. February 24, 1993). In its unpublished opinion, the court held by a two-to-one majority that the order to conduct the urinalysis test on the members of Petitioner's work section was not a subterfuge search for contraband.

On appeal, pursuant to Article 67(a)(3), U.C.M.J., 10 U.S.C. § 867(a)(3), the United States Court of Military Appeals affirmed Petitioner's conviction and sentence. *United States v. Taylor*, 41 M.J. 168 (C.M.A. 1994). In a three-to-two decision, the court held that the urinalysis test conducted on the members of Petitioner's work section was not a subterfuge search for contraband.

REASON FOR GRANTING THE PETITION

The protections of the Fourth Amendment are applied to the military through the President's promulgation of Rules of Evidence pursuant to Article 36(a), Uniform Code of Military Justice, 10 U.S.C. § 836(a). *United States v. Taylor*, 41 M.J. 168, 170 (C.M.A. 1994). Military Rule of Evidence 311(a) provides for the suppression of evidence seized as a result of an unlawful search or seizure. If the evidence is seized based upon a suspicion of criminal activity, the suspicion must rise to the level of probable cause. The evidence must be seized pursuant to an authorization to search a specific person or place for specific evidence. Improper attempts to circumvent the requirement for a probable cause determination in such cases, or "subterfuge" searches, constitute an illegal seizure, and will result in suppression of the evidence at trial. *United States v. Bickel*, 30 M.J. 277 (C.M.A. 1990); *cf. New York v. Burger*, 482 U.S. 691 (1987).

A legitimate military inspection, on the other hand, is outside the parameters of probable cause searches. Military Rule of Evidence 313(b) governs the admissibility of evidence seized pursuant to an inspection. The basic distinction between a military search and an inspection, as it pertains to evidence later used in a court-martial, is the underlying rationale for the seizure. If the seizure is based primarily upon a desire to procure evidence against an individual for use in a prosecution, then it must proceed from probable cause or some other legitimate exception to that requirement. If the seizure has a legitimate inspection purpose, then the later use of the evidence in a court-martial is permitted. *United States v. Flowers*, 23 M.J. 647 (N.M.C.M.R. 1986). However, when a contraband inspection focuses upon a particular unit or portion of that unit to circumvent the requirement for procuring a probable cause search of one of the members of that unit, there must be clear and convincing evidence that the inspection was not a subterfuge for a search. *United States v. Thatcher*, 28 M.J. 20 (C.M.A. 1989).

In Petitioner's case, the commanding officer of Petitioner's unit, Captain Lindsay, had decided to conduct an inspection of part of his unit, but he did not select any particular part of the unit for

the inspection. On December 7, 1989, the unit Substance Abuse Control Officer (SACO), Sergeant Ramon, had received an anonymous telephone call that Petitioner had used marijuana. Sometime the next day, December 8, or the following Monday, December 11, he had relayed this information to the officer-in-charge of the S-1 section, Captain Jackson. On December 11, Captain Jackson called Captain Lindsay and encouraged selection of the S-1 section, of which Petitioner was part, for the urinalysis inspection. Captain Jackson did not inform Captain Lindsay of the anonymous tips regarding Petitioner. Since volunteering a section for a urinalysis inspection was highly unusual, the call aroused suspicions on the part of Captain Lindsay, and he spoke to Sergeant Ramon about them. He specifically asked Sergeant Ramon, "Is there anything special going on in the S-1 section that I should know about?" Sergeant Ramon replied, "I don't think I'm at liberty of discussing this with you at this particular time, sir." Without pursuing his questioning any further, Captain Lindsay then selected the S-1 section for a urinalysis inspection on the next day, December 12. On the day of the urinalysis, Captain Jackson discovered that Petitioner was at home recuperating from having had three wisdom teeth extracted. Captain Jackson then telephoned Petitioner and ordered him back to the base to prove that he was authorized to stay home. When Petitioner showed Captain Jackson the authorization he had received from his dentist, instead of allowing him to go home, Captain Jackson ordered Petitioner to provide a urine sample. The fact that Captain Jackson took great effort to make certain that Petitioner provided a urine sample, regardless of the fact that Petitioner was exempt from his duties, demonstrates that Petitioner was specifically targeted for the urinalysis by his superiors.

The underlying conduct of those executing inspections must be reviewed in determining the legitimacy of the inspection. *United States v. Barnett*, 18 M.J. 166 (C.M.A. 1984). The actions of the superiors in Petitioner's chain-of-command demonstrate that the purported inspection of Petitioner's urine, conducted under the guise of a routine urinalysis test, was, in actuality, nothing more than a pretext for obtaining evidence of Petitioner's reputed drug use. The facts in this case are not unlike the scenario presented in *United States v. Lange*, 15 U.S.C.M.A. 486, 35 C.M.R. 458

(1965), in which the Court of Military Appeals held that a "shake-down" inspection of a military barracks was not a valid inspection because it was conducted only after a squadron administrative officer had learned of a theft from the barracks. In Petitioner's case, the urinalysis sweep of Petitioner's work section was urged by Sergeant Ramon and Captain Jackson only after these individuals received an anonymous tip that Petitioner was using illegal drugs. Because the urinalysis was conducted with a view toward obtaining evidence of unlawful drugs in Petitioner's urine sample, it is clear that the motive shared by Sergeant Ramon and Captain Jackson was to search for evidence to be used in a criminal prosecution, rather than to test the general readiness of the S-1 section. Accordingly, the evidence obtained against Petitioner was seized by way of a search, not an inspection.

The lower courts, however, held that the principal focus, in determining whether the inspection was valid, was on the conduct of Captain Lindsay, since he ultimately ordered the inspection of the S-1 section. Captain Lindsay, the lower courts held, was isolated from any information implicating Petitioner as a drug user, since no one had informed Captain Lindsay of the anonymous tips. Therefore, Captain Lindsay's ultimate decision to inspect the S-1 section was not a pretext to seize Petitioner's urine. However, two important facts belie this conclusion: Captain Lindsay saw the need to question Captain Jackson's motive for volunteering his section for the urinalysis; and, upon questioning Sergeant Ramon about his suspicions, he was given a patently evasive answer which he elected not to pursue further. Thus, the lower courts' conclusion that Captain Lindsay's suspicions were satisfied by his exchange with Sergeant Ramon is insupportable. It was preposterous that the commanding officer's concerns were allayed by the misleading information provided; nevertheless, he selected the S-1 section for the inspection. *Taylor*, 41 M.J. 168, at 175 (Wiss, J., dissenting). The evidence shows that Captain Lindsay clearly had reason to suspect that Petitioner was using drugs, which negates the legitimacy of labelling the urinalysis as merely an innocent "inspection" of Petitioner's work section.

Even if the lower court's holding that the commanding officer was not aware of the information about Petitioner is accepted, his order to inspect the S-1 section falls outside the

parameters of a legitimate inspection because his subordinates knowingly withheld information from him regarding Petitioner's alleged drug use, while manipulating his decision to include Petitioner's work section, and therefore Petitioner, in the inspection. The Court of Military Appeals held that because Captain Lindsay never received any information implicating Petitioner, a wall of ignorance existed around him; therefore, his choice of the S-1 shop was not tainted by the anonymous information known to Captain Jackson and Sergeant Ramon. *Id.* at 172. However, Captain Jackson and Sergeant Ramon intentionally misled Captain Lindsay into believing that there was no special reason to pinpoint the S-1 shop, despite the fact that they had specific reason to pinpoint Petitioner, a member of that shop, based upon the reports of his drug usage. By doing so they improperly influenced the commander's inspection decision. In *Franks v. Delaware*, 438 U.S. 154 (1978), this Court held that an essential statement made in a police affidavit for a search warrant that is a deliberate falsehood, or made in deliberate disregard for the truth, voids the warrant. *Franks* thereby opened the door to attacks on the veracity of the facts underlying a probable cause determination by focusing on the improper conduct of the "police" authorities, and by admonishing that the fruit of such searches would not be admissible in evidence. Furthermore, several Federal circuits have held that *Franks* applies to omissions from affidavits, if those omissions are material. *United States v. Williams*, 737 F.2d 594 (7th Cir. 1984); *United States v. Lefkowitz*, 618 F.2d 1313 (9th Cir. 1980); *United States v. Vasquez*, 605 F.2d 1269 (2d Cir. 1979); *United States v. House*, 604 F.2d 1135 (8th Cir. 1979). Although Petitioner's case does not involve a probable cause determination *per se*, it involves an analogous situation in which a probable cause determination should have been made by the commanding officer, but was precluded by the actions of his subordinates.

Since positive results from a properly ordered inspection would be admissible in a trial by court-martial, the facts surrounding the authorization of the inspection must be carefully scrutinized to ensure that the inspection is not being used to circumvent the requirement for a prior probable cause determination. The deliberate omission of material matters by

Captain Jackson and Sergeant Ramon while advising Captain Lindsay on which section to choose for the urinalysis sweep exhibits disregard for the whole truth on the part of those in a position to influence the commanding officer's decision to order an inspection of a work section. The fact that these individuals were fully aware that this work section contained a suspected drug user, of whose identity they were well aware, evinces a deliberate attempt to circumvent the requirement to obtain a probable cause search authorization concerning that suspect. Moreover, the actions of these two individuals amounts to official misconduct by military command authorities with responsibilities analogous to police authorities in this situation. The spirit of this Court's decision in *Franks* precludes these subordinates from intentionally misleading their commanding officer into selecting Petitioner's work section for a unit inspection when they had material information which they should have presented to the commanding officer, but intentionally and deceptively omitted. The Fourth Amendment's requirement for a search authorization based upon probable cause is intended to prevent the very type of governmental violation of fundamental individual rights exhibited in this case. Therefore, the lower courts have eroded the protection against unreasonable searches and seizures available to service members through the Fourth Amendment and the Military Rules of Evidence by disregarding this Court's precedence set forth in *Franks*.

CONCLUSION

Inspections, both military and civilian, are proper under the Fourth Amendment. *Bickel*, 30 M.J. at 282; *United States v. Gardner*, 41 M.J. 189 (C.M.A. 1994); *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). However, when a so-called inspection is in reality a pursuit of specific evidence against a particular individual, it is a search subject to the requirements of the Fourth Amendment. *New York v. Burger*, 482 U.S. 691 (1987); *United States v. Johnston*, 24 M.J. 271 (C.M.A. 1987).

Petitioner's case presents a fundamental question of Constitutional Law which was resolved against Petitioner in sharply divided opinions in both of the lower appellate courts: Does a procedure in which urine is seized from a servicemember where a previous anonymous complaint about the servicemember's drug use has been received, and the information is then used against the servicemember both in ordering a unit sweep of his work section, and in singling him out to provide the sample, constitute a valid military inspection under the Fourth Amendment? This is a significant question which, in view of the ever-increasing drug testing in our society, needs to be resolved. This issue bears directly on the ability of the military to fairly maintain good order and discipline while ensuring the promotion of justice for service members. Accordingly, this Court should issue a writ of certiorari.

Respectfully submitted,

RICHARD KEITH STUTZEL
Major, U.S. Marine Corps
Counsel of Record

BRIAN CHRISTOPHER LANSING
Lieutenant, Judge Advocate
General's Corps
U.S. Naval Reserve

NAVY-MARINE CORPS APPELLATE
DEFENSE DIVISION
Washington Navy Yard
Building 111
Washington, D.C. 20374-1111
(202) 433-4161
Counsel for Petitioner

December 1994

APPENDICES

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 93-0595

NMCM 91 0669

UNITED STATES, *Appellee,*

v.

KEITH T. TAYLOR, *Appellant.*

Argued March 16, 1994
Decided September 30, 1994

For Appellant: *Lieutenant David P. Sheldon*, JAGC, USNR (argued)

For Appellee: *Lieutenant J.L. Epperson*, JAGC, USNR (argued); *Colonel T.G. Hess*, USMC, *Commander S.A. Stallings*, JAGC, USN, and *Captain Brett D. Barkey*, USMC (on brief).

Military Judge: A.M. Crebbin

Opinion of the Court

CRAWFORD, Judge:

Contrary to his pleas, appellant was convicted of wrongful use of marijuana, in violation of Article 112a, Uniform Code of Military Justice, 10 USC § 912a. The convening authority approved the sentence of a bad-conduct discharge, 45 days' hard

labor without confinement,[1] and reduction to the lowest enlisted grade. The Court of Military Review affirmed the findings and sentence in an unpublished opinion. We granted review on the following issue:

> WHETHER APPELLANT'S COMMAND CONDUCTED A SUBTERFUGE SEARCH WHEN SEIZING APPELLANT'S URINE WHICH WAS PURPORTEDLY SEIZED PURSUANT TO AN INSPECTION.

We hold that appellant's command complied with Mil.R.Evid. 313(b), Manual for Courts-Martial, United States, 1984, and did not conduct a subterfuge search in directing a urinalysis examination which resulted in seizure of appellant's urine.

FACTS

Appellant was an administrator in the S-1 section of the 5th Marine Regiment, 1st Marine Division, Camp Pendleton, California. On December 7, 1989, he had three wisdom teeth removed and was placed on 24-hours of bed rest. The commissioned officer in charge of the S-1 section was Captain (Capt.) Jackson. The Marines of the S-1 section fell under the command of Capt. Lindsay, the headquarters company commander of the 5th Marine Regiment.

On the same date that appellant had his teeth pulled, Sergeant (Sgt.) Ramon, the Regimental Substance Abuse Control Officer (SACO), received an anonymous telephone message on his answering machine that someone in the S-1 section had been using drugs.

On the following day, Friday, December 8, 1989, Capt. Lindsay made a decision to order a random urinalysis test the following week. Capt. Lindsay was not aware of the anonymous tip received

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[1]The court below erroneously stated this as confinement. Unpub. op. at 1.

by Sgt. Ramon. Capt. Lindsay told his executive officer to tell Sgt. Ramon about his decision to order the random urinalysis. Capt. Lindsay had several responsible and legitimate reasons for ordering a urinalysis inspection. First, Sgt. Ramon, an experienced SACO, was scheduled to separate from the service and Capt. Lindsay wanted to conduct the inspection prior to his separation. Second, with the Christmas holiday season approaching, Capt. Lindsay wanted to deter use of drugs in his command. And finally, he wanted to comply with Marine Corps directives requiring urinalysis testing. Capt. Lindsay had only a limited number of vials and had not yet decided how to select the section to be tested. He discussed the options with Sgt. Ramon. Sometime that same day Sgt. Ramon told Capt. Jackson about the anonymous call he had received about drug use by someone in the S-1 section.

On Monday, December 11, 1989, Sgt. Ramon told Capt. Jackson that a former member of the S-1 section had reported to him that appellant was a drug user. Thereafter, the Court of Military Review found:

> Captain Jackson called Captain Lindsay and asked when Captain Lindsay planned on doing urinalysis testing. Captain Lindsay replied, "Well, this week." Captain Jackson responded, "How do you plan to do it?" After Captain Lindsay replied, "It's going to be random," Captain Jackson stated, "Well, what about the S-1 section?" Captain Lindsay then said, "Fine, that fits right along, and why not just go ahead and get it out of the way." (R. 46). During the conversation, Captain Jackson did <u>not</u> tell Captain Lindsay about information he had received from Sergeant Ramon....

Unpub. op. at 2-3.

Capt. Lindsay testified that no one had ever volunteered a section before. With his suspicion perhaps raised, Capt. Lindsay asked Sgt. Ramon, "Is there anything special going on in the S-1 shop that I should know about?" Ramon replied to the effect of

"Not at this time." After this conversation on Monday, December 11, Capt. Lindsay then directed that the SACO conduct a urinalysis sweep of the S-1 section the next day.

That same Monday afternoon appellant's noncommissioned officer told him to go home because his face was swollen and he was not feeling well. Since his pain persisted, at 8:00 p.m. appellant went to the dental clinic and was given a pain killer and a "no duty" chit which excused him from duty until 8:00 a.m., Wednesday, December 13, 1989.

On Tuesday, December 12, 1989, appellant remained at home based on his excusal from work because of a "no duty" chit. During the early afternoon Sgt. Ramon told Capt. Jackson that he had received another report that appellant had smoked marijuana earlier with a female friend and had requested "Gold Seals," supposedly a diuretic to conceal drugs in the urine. At approximately 3:00 p.m. Capt. Jackson, not being sure whether appellant had a "no duty" chit, told appellant's NCOs to have appellant come to work. Appellant did. At this time he was told to provide the urine specimen that formed the basis for his conviction.

DISCUSSION

As we stated in *United States v. Lopez*, 35 M.J. 35, 39 (CMA 1992):

> The military, like the Federal and state systems, had hierarchical sources of rights. These sources are the Constitution of the United States; Federal Statutes, including the Uniform Code of Military Justice; Executive Orders containing the Military Rules of Evidence; Department of Defense Directives; service directives; and Federal common law. Unlike the Federal Rules of Evidence, Section III of the Military Rules of Evidence "codifies" the constitutional rules. Normal rules of statutory construction provide that the highest source authority will be paramount, unless a lower source creates

> rules that are constitutional and provide greater rights for the individual; for example, Mil.R.Evid. 305(e) as to notice to counsel, or Article 31, UCMJ, 10 USC § 831, requiring warnings to suspects not in custody.

The paramount source is the U.S. Constitution. The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The next applicable source is the Uniform Code of Military Justice, 10 USC §§ 801-934. Pursuant to Article 36(a), UCMJ, 10 USC § 836(a), the President has promulgated Rules of Evidence. Mil.R.Evid. 311(a) sets forth the modern understanding of the Fourth Amendment by stating that "[e]vidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against" a person with standing to challenge its admissibility.

Mil.R.Evid. 311 through 317, like the decisions of the Supreme Court, divide Fourth Amendment issues between coverage (that is, when the Fourth Amendment is applicable) and protections. Mil.R.Evid. 314(d) provides that "[g]overnment property may be searched . . . unless the person to whom the property is issued or assigned has a reasonable expectation of privacy therein at the time of the search." *See also United States v. Wooten*, 34 M.J. 141 (CMA 1992) (no expectation of privacy in bank records); *United States v. Parrillo*, 34 M.J. 112 (CMA 1992) (overheard telephone call not a search); *United States v. Schmitt*, 33 M.J. 24 (CMA 1991) (automobile may have been abandoned); *United States v. Britton*, 33 M.J. 238 (CMA 1991) (no expectation of privacy in another's locker even though not used for 5 months); *see United States v. Thatcher*, 28 M.J. 20, 23 (CMA 1989).

We have discussed the privacy interest in numerous cases before this Court. *See United States v. McCarthy*, 38 M.J. 398 (CMA 1993); *United States v. Middleton*, 10 M.J. 123 (CMA 1981). As we indicated in *Middleton*:

> In considering what expectations of privacy a service-member may reasonably entertain concerning military inspections, we must recognize that such inspections are time-honored and go back to the earliest days of the organized militia.

10 M.J. at 127.

In *McCarthy* we stated:

> We need not determine the outer limits of appellant's "reasonable" expectation of privacy. Suffice it to say that he could not reasonably expect to avoid apprehension in this case by retreating to his room.

38 M.J. at 403.

We also indicated in *Lopez* that "the Supreme Court has never expressly applied the Bill of Rights to the military, but has assumed they applied." *Id.* at 41.[2]

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[2]As the Court stated in *Davis v. United States*, 114 S.Ct. 2350, 2354 n.* (1994):

> We have never had occasion to consider whether the Fifth Amendment privilege against self incrimination, or the attendant right to counsel during custodial interrogation, applies of its own force to the military, and we need not do so here. The President, exercising his authority to prescribe procedures for military criminal proceedings, *see* Art. 36(a), UCMJ, 10 U.S.C. § 836(a), has decreed that statements obtained in violation of the Self-Incrimination Clause are generally not admissible at trials by court-martial. Mil.R.Evid 304(a) and (c)(3). Because the Court of Military Appeals has held that our cases construing the Fifth Amendment right to counsel apply to military interrogations and control the admissibility of evidence at trials by court-martial, *see, e.g., United States. v. McLaren*, 38 M.J. 112, 115 (1993); *United States*

This is not only of academic importance, but also it is important to the President in deciding what rules should be applied to the military.[3] Because of the "special needs" in the military, *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 628 (1989) (case for testing without individualized suspicion is "compelling"); *cf. New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (inspection based upon a reasonable suspicion is appropriate), the Fourth Amendment may not apply in total. *See United States v. McCarthy, supra.* Judge Cox's view concerning the reasonable commander and the reasonableness clause of the Fourth Amendment may apply. That view is as follows:

> The Fourth Amendment only protects military members against unreasonable searches within the context of the military society. Something as drastic as a "shakedown inspection" can only be justified in the military because of the overriding need to maintain an effective force. Likewise, preemptive strikes on drugs and other dangers can only be reasonable because of their impact on the

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v. Applewhite, 23 M.J. 196, 198 (1987), and the parties do not contest this point, we proceed on the assumption that our precedents apply to courts-martial just as they apply to state and federal criminal prosecutions.

[3]The discussion concerning application of the Fourth Amendment is more than an academic discussion. It relates directly to the bright-line rules set forth in Section III of the Military Rules of Evidence, Manual for Courts-Martial, United States, 1984. While these rules are helpful for commanders, promulgating the rules can be a very tedious process, taking sometimes up to 4 years to promulgate a rule. Draft Mil.R.Evid. 305(e), which seeks to conform military practice to *Minnick v. Mississippi*, 498 U.S. 146 (1990) and *McNeil v. Wisconsin*, 111 S.Ct. 2204 (1991), has not been approved as of yet. Judge Cox has emphasized his concern about the rules in *United States v. Lopez*, 35 M.J. 35, 42 (CMA 1992) (Cox, J., concurring with modest reservations), and *United States v. Alexander*, 34 M.J. 121, 127 (CMA 1992) (Cox, J., concurring in the result). Finally, this Court in *United States v. Middleton*, 10 M.J. 123 (CMA 1981), while recognizing Mil.R.Evid. 313(b) did not set forth why the rule was promulgated and the impact of *Middleton* on the prior cases--*United States v. Roberts*, 2 M.J. 31 (CMA 1976), and *United States v. Thomas*, 1 M.J. 397 (CMA 1976). *See also* Lederer and Borch, *Does the Fourth Amendment Apply to the Armed Forces?*, 3 William and Mary Bill of Rights J. 219 (Summer 1994).

> mission. The United States Court of Military Appeals has the obligation to ensure that inspections, searches, and seizures in the military society are reasonable in their inception and in their conduct. This means that commanders must have rules which are honest, simple, forthright, and easy for both the commander and the command to understand.

United States v. Lopez, 35 M.J. at 45 (citations omitted) (Cox, J., concurring with modest reservations).

Unless there are changes to the Rules, we are bound by Mil.R.Evid. 313(b), which provides in part:

> An "inspection" is an examination of the whole or part of a unit ... to determine and to ensure the security, military fitness, or good order and discipline of the unit .... An order to produce body fluids, such as urine, is permissible in accordance with this rule. An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inspection within the meaning of this rule. If a purpose of an examination is to locate weapons or contraband, and if: (1) the examination was directed immediately following a report of a specific offense in the unit, ... and was not previously scheduled; (2) specific individuals are selected for examination; or (3) persons examined are subjected to substantially different intrusions during the same examination, the prosecution must prove by clear and convincing evidence that the examination was an inspection within the meaning of this rule.

In *United States v. Bickel*, 30 M.J. 277 (CMA 1990), we upheld the constitutionality of this provision.

But Mil.R.Evid 313(b), which makes a distinction between administrative inspections for prosecutorial purposes, is probably more restrictive than it need be. *See e.g., Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990); *National Treasury*

Employees Union v. Von Raab, 489 U.S. 656 (1989); *Skinner v. Railway Labor Executives Ass'n, supra. Cf. Griffin v. Wisconsin*, 483 U.S. 868 (1987); *New Jersey v. T.L.O., supra.*

The threshold question in this case is whether Capt. Lindsay's decision to order a urinalysis examination was a subterfuge search for contraband rather than a lawful inspection. Our principal focus is on the role of Capt. Lindsay. He decided to order a random urinalysis of his unit because he knew that the unit's experienced SACO was scheduled to separate from the service; he wanted to deter drug use during the Christmas holidays; and he wanted to comply with Marine Corps policy and directives requiring urinalysis testing. When Capt. Lindsay made his decision to conduct the urinalysis examination, there had not been a "report of a specific offense in the unit." There were no "specific individuals . . . selected for examination" or "substantially different intrusions" made a part of this urinalysis testing. Further, an inspection may include examination of a "whole or part of a unit." Thus, we conclude that Capt. Lindsay's decision to order a urinalysis examination was a legitimate action to conduct a lawful inspection in compliance with Mil.R.Evid. 313(b).

We are mindful that Sgt. Ramon and Capt. Jackson had received information linking appellant to drug use. However, there is no evidence that either of them conveyed this information to Capt. Lindsay. At the time of Jackson's phone call to Lindsay during which he volunteered the S-1 section for testing, Jackson was in receipt of two pieces of information. First, he was aware that Sgt. Ramon had received an anonymous tip that someone in the S-1 section had used drugs. And second, he was also aware that Sgt. Ramon had thereafter received an allegation that appellant was a drug user. We need not answer the question whether these two pieces of information constitute "a report of a specific offense in the unit." There is no indication that either of these allegations were known to Capt. Lindsay. Further, Capt. Lindsay's decision to accept Capt. Jackson's suggestion to test the S-1 section followed Lindsay's legitimate decision to conduct a urinalysis inspection. While Capt. Lindsay testified he pinpointed the S-1 section after he talked to Capt. Jackson, the primary purpose of

ordering the inspection was to "deter and to disencourage personnel from using ... drugs." There is no indication of a so-called "wink and a nod" (*see* ___ M.J. at (1) (Wiss, J., dissenting) between Capt. Lindsay, Capt. Jackson, and Sgt. Ramon to create a pretext for an inspection. And finally, we will not impute the knowledge of either Capt. Jackson or Sgt. Ramon to Capt. Lindsay. In conclusion, we hold that, under the facts of this case, there was a proper inspection of part of a unit by a commander and, therefore, the evidence obtained through that inspection is admissible.

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

Judges COX and GIERKE concur.

SULLIVAN, Chief Judge (dissenting):

A

The granted issue in this case is:

> WHETHER APPELLANT'S COMMAND CONDUCTED A SUBTERFUGE SEARCH WHEN SEIZING APPELLANT'S URINE WHICH WAS PURPORTEDLY SEIZED PURSUANT TO AN INSPECTION.

An initial question arises from the majority opinion concerning its legal basis (or lack thereof) for deciding this issue. Appellant argues that subterfuge searches are prohibited by Mil.R.Evid. 313, Manual for Courts-Martial, United States, 1984, and our case law, and their fruits are inadmissible at courts-martial. *See* Mil.R.Evid. 311 and 315; *United States v. Johnston*, 24 M.J. 271 (CMA 1987). In addition, I note that administrative inspections which are mere pretexts to search for criminal evidence are unreasonable searches for purposes of the Fourth Amendment. *New York v. Burger*, 482 U.S. 691, 716 n.27 (1987). Accordingly, I must disassociate myself from the majority opinion's resolution of the granted issue without reference to military or civilian case law. ___ M.J. at

(10-11) .

My next concern is the factual basis of the majority opinion concerning the legitimacy of the challenged inspection. The court below commented on Captain Jackson's role both before and after the decision to inspect had been made by Captain Lindsay, as follows:

> Obviously, Captain Lindsay's decision to select the S-1 section for urinalysis testing was influenced to some extent by Captain Jackson's telephone call to him. However, that fact is not dispositive of the issue. At the time of the conversation, Captain Lindsay had already decided to conduct random testing. *All the call did was to subtlety suggest to him that he should select the S-1 for testing*; it in no way singled out the appellant for testing.
>
> * * *
>
> In this case, the commander simply decided that an entire section would be tested. He did so without knowledge that two members of the section, Captain Jackson and Sergeant Ramon, suspected that another member of the section had illegally used drugs. *We deem it of no significance that the appellant was ordered to report to his work section from his quarters after receiving a "no duty" chit from a dental officer. In our opinion, Captain Jackson had authority to order the appellant, his subordinate, to report to work for urinalysis testing despite the appellant's receipt of a "no duty" chit from his dentist.* Additionally, we observe that Captain Jackson had investigated the appellant's situation on 12 Dec 1989 and been advised by someone at the dental clinic that appellant had not been to the dental clinic. Although not pivotal to our decision, this fact manifests to us that Captain Jackson was diligently pursuing his duties as an officer of Marines in an appropriate manner, *albeit* he received "bad scoop" from someone at the dental clinic.

> At the bottom line, this is not a case where a servicemember has been unreasonably singled out for urinalysis testing by a commander who merely suspects drug use. This appellant was required to do only what was required of all Marines in his work section....

Unpub. op, at 4-5 (emphasis added.) I disagree with the decision of the majority to disregard these facts as irrelevant to the granted issue.

The key question to me in this case is whether the knowledge and conduct of Captain Jackson can be considered on the issue of whether a "subterfuge" search occurred. The majority's opinion holds that these facts are not relevant since they were not communicated to Captain Lindsay (___ M.J. at 11) and he is "our principal focus" (___ M.J. at 10) under Mil.R.Evid. 313(b). Principal, however, does not mean exclusive; accordingly, I cannot join the majority's ultimate conclusion of irrelevance. Moreover, our case law and civilian case law make clear that it is necessary to consider the conduct of those executing the inspection in determining whether it was a legitimate administrative inspection or a subterfuge for a search for criminal evidence. *See United States v. Barnett*, 18 M.J. 166 (CMA 1984) (mere presence of law enforcement agents who suspect appellant of crime not sufficient to turn regular inventory into subterfuge search); *United States v. Thatcher*, 28 M.J. 20, 25-26 (CMA 1989) (conduct of persons conducting inspection after searching accused's spaces relevant on question of whether subterfuge search occurred); *Winters v. Board of County Commissioners*, 4 F.3d 848, 854-55 (10th cir. 1993), *cert. denied*, 114 S.Ct. 1539 (1994); *United States v. Johnson*, 994 F.2d 740, 743 (10th Cir. 1993). Therefore, I join Judge Wiss in concluding that the majority opinion is fatally flawed.

B.

I also join Judge Wiss in his recognition and rejection of the majority's general musings on the rights of servicemembers under the Constitution, the Code, and the Manual for Courts-Martial. The general thrust of this dicta is to raise doubt concerning the

protections afforded by the Constitution to members of our armed forces and to disparage the efforts of the President in providing for the re-enforcement of these rights at courts-martial. *Contra United States v. Johnston*, No. 93-0465, ___ M.J. ___, ___ (CMA Sep. 23, 1994) (Sullivan, C.J., dissenting). Judicial restraint dictates that this Court refrain from such disruptive conjecture and from legal opinions suggesting that a servicemember is too generously protected under military law.

Judge Crawford has at times signaled her intent to drive a wedge between the American servicemember and his Constitutional rights. *See, e.g., United States v. Weiss*, 36 M.J. 224, 234 (CMA 1992) (Crawford, J., concurring in the result) (the Appointments Clause in Article II of the Constitution does not apply to the selection of a military judiciary) *United States v. Lopez*, 35 M.J. 35, 41 (CMA 1992) (There "is an implicit recognition that the Supreme Court has never expressly applied the Bill of Rights to the military, but has assumed they applied."). *Contra* Nunn, *The Fundamental Principles of The Supreme Court's Jurisprudence in Military Cases* (hereafter Nunn), 29 Wake Forest L. Rev. 557, 564 (1994), where it was stated: "Although the constitutional guarantees of the Bill of Rights are generally available to servicemembers, the application of these guarantees in the military setting differs considerably from the manner in which they apply in civilian society." Today, she, joined by a majority of this Court, signals her further dissatisfaction with Presidential rulemaking designed to protect the privacy of servicemembers.

In *Weiss v. United States*, ___ U.S. ___, ___, 114 S.Ct. 752, 757 (1994), however, the Supreme Court squarely rejected Judge Crawford's position that military trial and appellate judges need not be appointed pursuant to the Appointments Clause of the Constitution. Moreover, in *Middendorf v. Henry*, 425 U.S. 25, 96 S.Ct. 1281 (1976), the Supreme Court expressly held that military accused "are entitled to the due process of law guaranteed by the Fifth Amendment." Then-Justice Rehnquist further commented that the extent to which a particular constitutional right is available to an accused is based on an "analysis of the interests of the individual and those of the regime to which he is subject." 425

U.S. at 43, 96 S.Ct. at 1291. I see nothing in *Davis v. United States*, ___ U.S. ___, 114 S.Ct. 235 (1994), to the contrary, particularly with respect to the Fourth Amendment ("Because the Court of Military Appeals has held that our cases construing the Fifth Amendment right to counsel apply to military interrogations and control the admissibility of evidence that our precedents apply to courts-martial[.]" (Citations omitted.)). *Id.* at 2354 n.*/.

The Supreme Court "gives particular deference to the determination of Congress" when analyzing the availability of specific Constitutional safeguards in military prosecutions and investigations. Moreover, it also provides some deference to the President in these matters. *See United States v. Mitchell*, 39 M.J. 131, 136 (CMA 1994), *citing Weiss v. United States*, 114 S.Ct. 760-61; *Goldman v. Weinberger*, 475 U.S. 503, 507-08 (1986) *cert. filed* in *Mitchell*, No. 94-174, 63 U.S.L.W. 3093 (July 18, 1994). Of course, this deference is not absolute. *See Schlesinger v. Councilman*, 420 U.S. 738, 758-61 (1975). *But see Rostker v. Goldberg*, 453 U.S. 57, 68 (1981) ("In deciding the question before us we must be particularly careful not to substitute our judgment of what is desirable for that of Congress, or our own evaluation of evidence for a reasonable evaluation by the Legislative Branch."). I for one do not join the majority's woeful lament concerning the President's authorized rule-making in this area of the law. *United States v. McCarthy*, 38 M.J. 398, 404 (CMA 1992) (Sullivan, C.J., concurring in result). *See United States v. Lopez*, 35 M.J. 35, 46, 48-49 (CMA 1992). (Sullivan, C.J., Concurring in the result). *See generally* Nunn, *supra*, 29 Wake Forest L. Rev. at 564 and n.27.

I only add this final thought. In America's eyes, the urinalysis program of the United States Armed Forces and its success rests on application of basic fairness for all servicemembers. Viewing this case with the heart of a soldier, I see basic fairness lacking. Captain Lindsay had decided to conduct random testing. Through the manipulations of Captain Jackson and Sergeant Ramon (members of this unit's command structure), appellant was purposefully selected to be tested. This situation is no different from one where Captain Jackson and Sergeant Ramon preordained appellant as the one to be tested by preparing a helmet full of

names for Captain Lindsay to pick from--and the helmet was full of slips of paper all bearing appellant's name.

This was not a random or a fair inspection. Such deception and underhandedness should not be allowed in the American Armed Forces. We expect fairness for ourselves and should require no less for the American servicemember. Since Sun Tsu Wu in the fourth century B.C., leaders of successful armed forces have recognized that the right to be treated fairly has been the hallmark of a superior fighting force. Let's not give up that tradition and undermine unit cohesiveness by condoning manipulation of our system, especially when a Marine's liberty is at stake. Perhaps this Marine is guilty, but we cannot sacrifice fairness to convict him. If we do, then all innocent servicemembers are at risk in the future as a result of similar machinations of the system by those aiding a commander in conducting an inspection.

WISS, Judge (dissenting):

I

Applying Mil.R.Evid 313(b), Manual for Courts-Martial, United States, 1984, and the precedent of this Court to the inspection here in issue, I disagree with the majority's reasoning and its conclusion that Captain Lindsay's order to inspect the S-1 section was permissible. The very essence of this rule is to serve legitimate military exigencies while, at the same time, preserving to the extent militarily possible the worth of individual privacy. Lindsay's search is outside of Mil.R.Evid 313's protection for two reasons.

First, the Government did not carry its burden of persuasion that Lindsay's own motivations were untainted. The record is clear: Lindsay had decided upon a random urinalysis but had not decided which unit elements to inspect. Out of nowhere, Captain Jackson mysteriously asks a series of beat-around-the-bush questions about Lindsay's intentions and then offers up S-1 section for inspection. Lindsay's suspicions obviously and justifiably aroused by this unheard-of volunteering for inspection, he asked Sergeant Ramon,

"Is there anything special going on in the S-1 shop that I should know about?," to which Ramon replied, "I don't think I'm at liberty of discussing this with you at this particular time, sir." The majority claims not to see a "'wink and a nod'" in this scenario. ___ M.J. at (12). To the contrary, I think it is preposterous that a commander would have his suspicions satisfied by this exchange. If anything, the response likely heightened, rather than allayed, his suspicions.

Second, I do not agree with the Chinese Wall that the majority builds up around the commander who made the inspection decision here, isolating him and insulating him as a matter of law from information held by his subordinates. I would not impute to such a commander, without more, the knowledge held only by a subordinate; but where that subordinate, because of that knowledge, affirmatively influences the commander's decision whether to inspect or whom in inspect, the whole rationale underlying Mil.R.Evid. 313 is undermined. A subordinate cannot knowingly withhold information from the commander or mislead the commander in some material respect *and* then proceed to influence the commander's inspection decision. *Cf. Franks v. Delaware*, 438 U.S. 154 (1978) (essential statement in police affidavit for search warrant that is a deliberate falsehood or made in deliberate disregard of the truth voids warrant).

II

Not content to limit itself to answering the granted issue, the majority spends substantial time--via dicta of the highest order--signaling an apparent readiness to roll back decades of struggle by this Court to reconcile the legitimate needs of military authorities emanating from the unique demands of military readiness, on the one hand, with the often-subconscious but nonetheless firmly implanted expectations of human and civil rights held by citizens of this country, on the other. That is not always an easy fit, but it is one that must be sought.

In very general terms, that fit has been found by inquiring in each instance whether a claimed "military exception" to an

otherwise protected area of individual rights *truly* was *necessary*: If so, the individual rights of those then in military service give way for the good of the larger society which they serve; if not, those rights shield the uniformed citizen as much as his or her civilian brothers and sisters against the might of government. *See generally Weiss v. United States*, 114 S.Ct. 752, 769 (Jan. 19, 1994) (Ginsburg, J., concurring) ("The care the Court has taken to analyze petitioners' claims demonstrates once again that men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service.").

In my view, the majority's gratuitous comments on the military search totally disregard the historical development in this area of our jurisprudence and are of academic interest at best.

APPENDIX B

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 STOVALL STREET
ALEXANDRIA VA 22332-2400

IN THE U.S. NAVY-MARINE CORPS
COURT OF MILITARY REVIEW
BEFORE

J.A. FREYER EDWIN W. WELCH R.M. MOLLISON

UNITED STATES

v.

KEITH T. TAYLOR, 276 48 9753
STAFF SERGEANT (E-6), U.S. MARINE CORPS

NMCM 91 0669 Decided 24 February 1993

Sentence adjudged 3 May 1990. Military Judge: A. M. Crebbin. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, 5th Marine Regiment, 1st Marine Division (Rein), FMF, Camp Pendleton, CA 92055-5507.

LT DAVID P. SHELDON, JAGC, USNR, Appellate Defense Counsel
Capt BRETT D. BARKEY, USMCR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WELCH, Judge:

The appellant was convicted of wrongful use of marijuana within 12 days prior to 12 Dec 1989[1] despite his pleas of not guilty and testimony proclaiming his innocence. We affirm the decision of the trial court.

I. The Factual Setting

Before discussing the issues raised by the assignments of error[2], we state the sequence of events presented in the record.

Thursday, 7 Dec 1989

The appellant had three wisdom teeth removed. His dentist gave him a 48 hour "no duty" chit (to be followed by 24 hours of bed rest). He was then a sergeant working as an administrator in the S-1 section of the 5th Marine Regiment, 1st Marine Division, at Camp Pendleton, California.

Captain Jackson was the adjutant and head of the S-1 section; Gunnery Sergeant Bench was the senior noncommissioned officer. Approximately 18 Marines were assigned to the S-1 Section, including Sergeant Ramon, the regimental Substance Abuse Control Officer (SACO), and other Marines who worked in the SACO's section (Corporal Siteman, Corporal Montion, and Sergeant Stoll). Marines of the S-1 were under the command of

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[1]In violation of Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a. He was tried by a special court-martial that included officers and enlisted members. The sentence: confinement for 45 days, reduction to pay grade E-1, and a bad-conduct discharge, which was approved by the convening authority.

[2]I. THE MILITARY JUDGE SHOULD HAVE SUPPRESSED THE RESULTS OF THE URINALYSIS IN THIS CASE.

II. THE MILITARY JUDGE ERRED IN NOT PERMITTING THE DEFENSE TO PUT ON EXCULPATORY EVIDENCE OF APPELLANT'S NON-USE OF MARIJUANA.

III. THE GOVERNMENT FAILED TO PROVE APPELLANT'S GUILTY BEYOND A REASONABLE DOUBT.

Captain Lindsay, the Commanding Officer, Headquarters Company, 5th Marine Regiment.

According to Sergeant Ramon, he received an anonymous telephone call that was recorded on his answering machine during the night of 7 Dec 1989. The caller advised that someone in the S-1 had been using drugs.

Friday, 8 Dec 1989

Sometime during the day, Captain Lindsay made the decision to order random urinalysis testing during the following week. He told his executive officer to begin the process and to tell his SACO that he wanted the testing done. He had several reasons for the decision. First, he anticipated that Sergeant Ramon would be separated from the Marine Corps sometime in the immediate future, and he did not want to conduct a urinalysis testing at the last minute during Sergeant Ramon's turn-over with his relief. Second, he wanted to deter the use of illegal drugs by Marines during the approaching holiday season. Third, he wanted to comply with Marine Corps directives requiring urinalysis testing.

When Captain Lindsay made the decision to conduct random urinalysis testing, he had not decided exactly how the testing would be conducted (e.g., whether to "pull a section out of a hat or to say everyone with this particular number ending SSN, or a percentage wide across the board.") (R. 70). That day, Captain Lindsay discussed the options with Sergeant Ramon.

Sometime during the day, Sergeant Ramon told Captain Jackson about the anonymous report on his answering machine reporting drug use by someone in the S-1. Captain Jackson told Sergeant Ramon that he would "get back with him." (R. 33).

Monday, 11 Dec 1989

Sometime during the morning, Sergeant Ramon told Captain Jackson that a former member of the S-1 section had reported to him that the appellant was a drug user. Initially, Sergeant Ramon

did not tell Captain Jackson the identity of the Marine who made the report. About an hour later, he told Captain Jackson the identity of the informer.

Captain Jackson called Captain Lindsay and asked when Captain Lindsay planned on doing urinalysis testing. Captain Lindsay replied, "Well, this week." Captain Jackson responded, "How do you plan to do it?" After Captain Lindsay replied, "It's going to be random," Captain Jackson stated, "Well, what about the S-1 section?" Captain Lindsay then said, "Fine, that fits right along, and why not just go ahead and get it out of the way." (R. 46). During the conversation, Captain Jackson did *not* tell Captain Lindsay about information he had received from Sergeant Ramon. Later, Captain Lindsay signed a letter directing that random urinalysis testing of members of the S-1 section begin at 0730, Tuesday 12 Dec 1989.

Corporal Siteman testified that he saw the appellant, during the morning, typing the letter directing the urinalysis testing. (R. at 246). The appellant denies that he typed the letter.

While the letter was being processed, just prior to lunch, Corporal Siteman heard the appellant making a telephone call. He heard the appellant say: "Hey, staff sergeant, this is Taylor. Can you hook me up with some Golden Seal," and that "he would be over that night to pick it up." (R. at 249). Apparently, "Golden Seal" is the diuretic believed by some to flush illegal drugs from their body.

At about 1300, Gunnery Sergeant Bench told the appellant to leave work and go home because the appellant's face was swollen and the appellant was not feeling well. The appellant did as directed.

At about 2000, the appellant went to the dental clinic and complained of pain. He was given "percocets," a pain killer, and a "no duty" chit that would expire at 0800, Wednesday, 13 Dec 1989.

<u>Tuesday, 12 Dec 1989</u>

At about 0720, the appellant called Gunnery Sergeant Bench from home and told the gunnery sergeant about going to the dental clinic the prior night and obtaining a "no duty" chit. Gunnery Sergeant Bench told the appellant not to come to work.

Sometime between 0800 and 1000, Captain Jackson called the appellant at home. After their discussion, Captain Jackson called the dental clinic and was incorrectly advised that the appellant had not come to the dental clinic the prior night.

At about 1500, Captain Jackson told Gunnery Sergeant Bench to tell the appellant to get into work and to bring his "no duty" chit. At about 1630, the appellant arrived at the office and presented his chit. He was then told to provide a urine specimen.[3]

II. The Order to Provide Urine

We disagree with the appellant's contention that Captain Lindsay's order to conduct urinalysis was a subterfuge search for contraband rather than a lawful inspection. We find that the primary purpose of the order was to comply with Marine Corps policy concerning urinalysis testing (i.e., to deter use of illegal drugs). More importantly, we find that Captain Lindsay's actions were not motivated by a desire to provide a subterfuge for avoiding limitations that apply to a search and seizure in a criminal investigation. *See United States v. Thatcher*, 28 M.J. 20 (C.M.A. 1989) and *United States v. Rogers*, 30 M.J. 824 (C.G.C.M.R.), *petition denied*, 32 M.J. 45 (C.M.A. 1990).

True, Captain Jackson and Sergeant Ramon had acquired knowledge concerning the accused's illegal use of drugs. However, they never conveyed this information to Captain Lindsay, their commanding officer. This lack of knowledge by Captain Lindsay, coupled with the undisputed evidence of his desire to complete urinalysis testing before his experienced SACO left the command, convinces us that we should not impute to

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[3]The trial judge made extensive findings concerning the sequence of events. (R. 386-389).

Captain Lindsay the knowledge acquired by his subordinates, which is, essentially, the position advocated by the appellant.[4]

We do not agree with the appellant's contention that Mil.R.Evid. 313(b)[5] required the Government to prove the existence of an inspection by clear and convincing evidence. Our conclusion is based on the fact that Captain Lindsay did not know there had been a recent report of a specific offense in his unit when he ordered urinalysis testing of members of his S-1 section. The "conscious command decision" necessary to trigger the clear and convincing burden of proof required by Mil.R.Evid. 313(b) is lacking in this case. *See United States v. Pappas*, 30 M.J. 513, 517 (A.F.C.M.R.), *petition denied*, 31 M.J. 490 (C.M.A. 1990).

Obviously, Captain Lindsay's decision to select the S-1 section for urinalysis testing was influenced to some extent by Captain Jackson's telephone call to him. However, that fact is not dispositive of the issue. At the time of the conversation, Captain Lindsay had already decided to conduct random testing. All the call did was to subtlety suggest to him that he should select the S-1 for testing; it in no way singled out the appellant for testing.

We agree with the Government's argument that case law does not require that a commanding officer's selection of a unit or section to be tested must be based on an absolutely random basis. In our opinion, a commanding officer has some discretion in such

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[4]If we did impute the knowledge acquired by Captain Jackson and Sergeant Ramon to their commanding officer, then we would resolve this case adversely to the appellant on the alternative theory advanced by the Government in footnote 2 of its brief (i.e., that the commanding officer had probable cause to order appellant to submit to urinalysis testing, per guidance in *United States v. Middleton*, 10 M.J. 123, 134 (C.M.A. 1987)).

[5]Which states in part that the Government must prove the existence of an inspection by "clear and convincing" evidence if the purpose of a challenged examination is to locate contraband, and the examination was "immediately following a report of a specific offense in the unit." We add that if the burden to prove the existence of an inspection in this case was by "clear and convincing" evidence, we would find that the Government had carried that burden.

matters, so long as his actions do not arbitrarily focus on one or more individuals whom he suspects used drugs illegally. Stated otherwise, we do not think that a commander has to "roll the dice" or "pick a number" when he selects a unit for inspection by urinalysis testing, *albeit*, such a method moots many appellate issues. *See United States v. Flowers*, 26 M.J. 463 (C.M.A. 1988). In this regard, the applicable Marine Corps Order[6], states in part that random urinalysis

> must be conducted on all Marines . . . on a routine basis . . . . A system should be used to ensure that all Marines are tested annually in a random fashion. Random testing may take several forms, to include unit sweeps (simultaneous testing of all members of a command), partial testing by . . . work section.

Thus, Captain Lindsay's decision to test all members of his S-1 section clearly comported with directives of the Commandant of the Marine Corps. Guidance in the U.S. Navy is similar. *See United States v. Daskam*, 31 M.J. 77 (C.M.A. 1990).

In this case, the commander simply decided that an entire section would be tested. He did so without knowledge that the two members of the section, Captain Jackson and Sergeant Ramon, suspected that another member of the section had illegally used drugs. We deem it of no significance that the appellant was ordered to report to his work section from his quarters after receiving "no duty" chit from a dental officer. In our opinion, Captain Jackson had authority to order the appellant, his subordinate, to report to work for urinalysis testing despite the appellant's receipt of a "no duty" chit from his dentist. Additionally, we observe that Captain Jackson had investigated the appellant's situation on 12 Dec 1989 and been advised by someone at the dental clinic that appellant had not been to the dental clinic. Although not pivotal to our decision, this fact manifests to us that

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[6] MCO P5300.12, ¶ 3003.3.

Captain Jackson was diligently pursuing his duties as an officer of Marines in an appropriate manner, *albeit* he received a "bad scoop" from someone at the dental clinic.

At the bottom line, this is not a case where a servicemember has been unreasonably singled out for urinalysis testing by a commander who merely suspects drug use. This appellant was required to do only what was required of all Marines in his work section. In our opinion, issuance of the order that led to appellant's conviction was in accordance with principles established by a growing line of cases concerning urinalysis testing. *See United States v. Williams*, 35 M.J. 323 (C.M.A. 1992), and *United States v. Daskam, supra*, and cases cited therein.

III. *Procedural Irregularities in the Urine Collection Process*

We disagree with the appellant's position that irregularities in the collection process made the results of urinalysis testing unreliable as a matter of law.

The trial judge made extensive findings concerning the steps taken by Marines involved in the collection process (*see* R. 524-527 or pages 13-15 of Government counsel's brief), and appellate counsel have thoroughly briefed and argued the issues relating to the trial judge's findings. In a nutshell, appellant complains that the following five alleged errors occurred:

a. The SACO, Sergeant Ramon, was not a staff noncommissioned officer, contrary to wording in the Urinalysis Coordinator's Handbook (handbook), which cites a need to assign either an officer or staff noncommissioned officer to this important position to "maintain the credibility and integrity of the program" etc.

b. One individual, Sergeant Ramon, served as both the observer and coordinator for the collection of appellant's specimen, contrary to cited wording in the handbook and applicable local order, Marine Corps Base Order P5300.13A.

c. The observer, Sergeant Ramon, also supplied a specimen for testing, contrary to cited wording in the handbook and applicable local order.

d. After the appellant's urine specimen tested negative during the screening test at Camp Pendleton's Consolidated Substance Abuse Center (CSACC), the specimen was not destroyed as required by the applicable base order; rather, it was sent to the Navy Drug Screening Laboratory in San Diego, where it tested positive.

e. The appellant's sample sat for seven days at Camp Pendleton before it was sent to the laboratory in San Diego, contrary to cited wording in the handbook which recommends against storage of such specimens for any length of time.

Our reading of *United States v. Pollard*, 27 M.J. 376 (C.M.A. 1989), *United States v. Konieczka*, 31 M.J. 289 (C.M.A. 1990), and *United States v. Whipple*, 28 M.J. 314 (C.M.A. 1989) leads us to adopt the position advocated by the Government with regard to each of the alleged discrepancies. More specifically, proceeding *seriatim*, we conclude:

a. The assignment of a sergeant SACO, vice an officer of staff noncommissioned officer, was not so significant in terms of ensuring the fundamental reliability of the specimen collection process that the military judge abused his discretion in admitting the urinalysis result and allowing the matter to be considered by the members. *Whipple; Pollard.*

b. An observer was not required as a condition precedent to admissibility of appellant's specimen.

c. Sergeant Ramon and the appellant did not provide specimens in the same batch of specimens. Sergeant Ramon's was in batch number 124, the first batch; the appellant's was in batch number 126. Sergeant Ramon never touched batch number 124; Sergeant Stoll handled that batch. Sergeant Ramon assisted Sergeant Stoll by filling out the top part of the urine sample custody document

that accompanied the appellant's specimen (R. 726); however, he did not handle the specimens in batch number 126 (*ergo*, he was not in a position to switch appellant's sample with his).

d. Appellant's urine specimen tested negative as the CSACC at Camp Pendleton, based on EMIT testing. (R. 863). Thereafter, the Officer-in-Charge of the CSACC directed that 1000 samples screened as negative be sent to the Navy Drug Screening Laboratory in San Diego. The appellant's specimen was one of the 1000; it tested positive when exposed to more sophisticated testing, and the results led to his conviction. Though the base order provided for the disposal of negative urine specimens by CSACC, the import of the order was more in the nature of a grant of authority for the disposal of unneeded urine, than it was the grant of amnesty or the creation of some technical personal right against detection. Additionally, the motive for forwarding the block of samples--quality control--was legitimate. The size and status of the block of specimens forwarded belie any notion that the appellant was discriminated against or in some way targeted as in *Konieczka*. Like the initial screening, the subsequent analysis by the laboratory was an administrative inspection, and nothing occurred that transmogrified it into something else.

e. We consider that the handbook's comments regarding storage of specimens are merely hortatory; they grant no rights to the accused which form the basis of any relief before this Court. Additionally, the comments are contrary to guidance mandating storage of specimens at the Navy Drug Screening Laboratory in San Diego.

IV. *Exclusion of Testimony*

The Government agrees that the trial judge erred by (a) not letting the appellant's girl friend, Ms. Goins, testify that neither she nor the appellant used marijuana, and (b) not allowing the appellant to testify that his girl friend did not use marijuana.

We agree with the Government that an application of the principles in *United States v. Weeks*, 20 M.J. 22 (C.M.A. 1985) to

the case at bar leads to the conclusion that the error does not require reversal of the conviction. *Weeks* requires that we analyze four factors when a judge erroneously denies an accused the presence of a requested witness: (a) the strength of the Government's case, (b) the plausibility of the defense theory, (c) the materiality of the proffered testimony, and (d) the quality of the defense evidence and whether there is any substitute for the excluded evidence in the record.

Focusing on the first *Weeks* factor, we conclude that there are at least eight items of evidence indicative of an exceptionally strong case against the appellant. These eight items are listed below in Part V of our opinion, our evaluation of the evidence. Turning to the second factor, we observe that the defense theory on the merits was that the urinalysis testing was flawed from start to finish (*i.e.*, that the Government could not prove beyond reasonable doubt that the appellant's urine tested positive) and that the appellant had a good character (*i.e.*, he was not the type person who would commit the offense charged). Frankly, in the face of the evidence marshalled by the government, we have little confidence in the theory of innocence, and, as our following discussion will indicate, we do not believe that either the proffered testimony of Ms. Goins or the appellant would significantly advance this theory. In this case, factors three and four of the *Weeks* factors run together. In our opinion, the materiality of both Ms. Goins' testimony and the appellant's testimony about her is quite low. In reaching this conclusion, we have reviewed the proffered testimony of Ms. Goins that appears in Appellate Exhibit XXI ("She is expected to testify that she has never done drugs of any kind nor encouraged Staff Sergeant Taylor to misuse them. Ms. Goins is expected to testify that Staff Sergeant Taylor has never used marijuana in her presence nor has he ever given her any indication that he was under the influence of marijuana."). If the above-cited testimony had been offered, along with the appellant's testimony that Ms. Goins had never smoked marijuana, we are confident that it would have received little weight. This evaluation is based upon considerations discussed by the trial judge when he excluded this evidence (*e.g.*, that the testimony does not exclude the possibility that the appellant smoked marijuana at a time when Ms. Goins was

not present) and our belief that testimony of this nature is frequently viewed with skepticism by court members. Additionally, the appellant presented four witnesses who testified to his good military character, plus copies of numerous documents in his service record indicative of his good military character. Based upon these factors, we find that the appellant was not prejudiced by the actions of the judge that are the subject of the second assignment of error.

V. *Evaluation of Evidence*

We find that the evidence proves the appellant's guilt beyond reasonable doubt.

As evidenced by the weight of the record of trial and accompanying papers we have evaluated, this case was thoroughly litigated at both the trial and appellate level. The evidence against the appellant includes the following damning proof of guilt:

a: The positive urinalysis test result based on sophisticated testing at the Navy Screening Laboratory in San Diego. (R. 755-794).

b. Expert testimony indicating that the re-test of appellant's specimen might not have disclosed the presence of percocet even if the appellant had taken the drug. (R. 986).

c. Corporal Siteman's testimony that he heard the appellant on the telephone on 11 Dec 1989 asking a staff sergeant to assist him in getting "Golden Seal," a substance believed by some to flush drugs from the system.

d. Corporal Siteman's testimony that the appellant had told him during the first week in Dec 1989 about smoking marijuana with a girl friend.

e. Sergeant Ramon's testimony that the appellant had told him "off the record" during the urine collection process that he, the appellant, had used marijuana, that he indicated that he would

"pop-positive," and that he stated while urinating "[t]here goes my career."

f. The appellant's admission that he had said that he was going to "pop" "just to find out what was going on as far as being recalled to work." (R. 1033).

g. The evidence that appellant was in pain because of dental surgery and that he received pain killers and a "no duty" chit, factors indicating a reason and opportunity to use marijuana with a diminished expectation of being caught.

h. Testimony indicating that the appellant acquired knowledge that his section would undergo urinalysis testing and soon thereafter managed to be sent home.

In summary, we are convinced beyond a reasonable doubt that the requested witness would not have tipped the balance in the appellant's favor and that the evidence of guilt was so strong as to show no reasonable possibility of prejudice concerning his conviction for marijuana use. *United States v. Fisher*, 24 M.J. 358 (C.M.A. 1987). We view as particularly fanciful the appellant's theory that he was framed.

For the reasons stated, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial right of the appellant was committed. Accordingly, the findings and sentence as approved on review below are affirmed.

EDWIN W. WELCH

(SEE CONCURRING/DISSENTING OPINION)
J. A. FREYER

Judge MOLLISON concurs.

R. M. MOLLISON

FREYER, Senior Judge (concurring in part and dissenting in part):

I concur in the excellent analysis of the evidence contained in the principal opinion and agree that, if the results of the urinalysis were properly admitted, the conviction should stand.

I cannot, however, accept the conclusion that the urinalysis satisfied the criteria for a random inspection. The principal opinion acknowledges the unquestionable reality that Captain Jackson's volunteering of his section influenced Captain Lindsay's selection of that section for testing. The evidence also shows that Captain Jackson volunteered his section immediately after receiving a report that the appellant was a drug user, and that legally significant circumstance, elucidated further by the persistent efforts made to ensure that the appellant was tested, while the executive officer was permanently excused when he was temporarily unable to provide a sample, [1] establishes that the report received by Captain Jackson concerning the appellant strongly influenced his decision to volunteer his section in order to "catch" the appellant. If the report that the appellant was a drug user motivated Captain Jackson to volunteer his section, and Captain Jackson's volunteering of his section influenced Captain Lindsay to single out that particular section for urinalysis, I cannot understand how the report that the appellant was a drug user did not play a proximately causative role in the resulting urinalysis of Captain Jackson's section so as to destroy its randomness.

In some respects, this situation strikes me as analogous to the situation in which material facts are omitted from the affidavit supporting an application for a search warrant. Had Captain Jackson candidly informed Captain Lindsay that he was volunteering his section because he wanted to catch the appellant after having received what was at the time an unsubstantiated report that the appellant was a drug user, Captain Lindsay would

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[1] *See United States v. Parker*, 27 M.J. 522, 527 (A.F.C.M.R. 1988).

have been precluded from ordering an "inspection" urinalysis of that particular section, unless it happened, nevertheless, to be picked for inspection by some process ensuring random selection, which the Government would have the burden of proving by clear and convincing evidence. Not surprisingly, therefore, Captain Jackson intentionally omitted that material information from his communication to Captain Lindsay. In my view, the principles of *Franks v. Delaware*, 438 U.S. 154 (1978), which have been held to apply equally to omissions as to express falsehoods, *United States v. Williams*, 737 F.2d 594, 604 (7th Cir. 1984), also vitiate the randomness of the urinalysis ordered by Captain Lindsay in this case.

Other information acquired by Captain Jackson may have attained the level of probably cause to seize the appellant's urine, but it was acquired after the "inspection" of Captain Jackson's section had already been ordered by Captain Lindsay. There is no evidence that it was ever communicated to Captain Lindsay. In *United States v. Middleton*, 10 M.J. 123 (C.M.A. 1987), the commander with power to order a search was on the scene and was personally aware of the information constituting probable cause when the search was conducted; hence, his authorization, albeit unarticulated, could be implied from the circumstances. Probable cause does not exist in the air; it must at least reside in the mind of the official empowered to authorize a search before an authorization can be implied so as to convert a "bad" inspection into a "good" search. If the mere existence of probable cause were sufficient to validate any unauthorized (in the sense of warrantless) search, the authorization requirement would, in effect, be banished from military law, and every unauthorized search would be examined retrospectively, like an apprehension, for probable cause. That is not a search-and-seizure doctrine which either the Constitution would tolerate or the President had prescribed. In any event, I am aware of no basis for imputing to Captain Lindsay any knowledge acquired by Captain Jackson after Captain Lindsay had already ordered the "inspection" of Captain Jackson's section.

Absent any other basis for admitting the urinalysis results, I am of the opinion that the motion to suppress them should have been

granted.

J. A. FREYER